

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

DEVRA HANEY-WILLIAMS,

Plaintiff(s),

v.

GLAXOSMITHKLINE LLC, et al.,

Defendant(s).

Case No. 2:17-CV-2900 JCM (EJY)

ORDER

Presently before the court is third-party defendant Jubilant Cadista Pharmaceuticals, Inc.'s ("Jubilant") motion to dismiss (ECF No. 108) third-party plaintiff Sam's West, Inc.'s ("Sam's West") third-party complaint (ECF No. 100). Sam's West filed a response in opposition (ECF No. 119), to which Jubilant replied (ECF No. 122).

Also before the court is Jubilant's motion for summary judgment (ECF No. 135) as to Sam's West's third-party complaint. Sam's West filed a response (ECF No. 147), to which Jubilant replied (ECF No. 158).

# **I. BACKGROUND**

This action arises from injuries that plaintiff Devra Haney-Williams ("Devra") allegedly suffered as a result of her use of Lamotrigine, a generic prescription medication. (ECF No. 100). Devra originally filed her complaint in Nevada state court in October 2017. (ECF No. 1). The action was subsequently removed to federal court on November 20, 2017. (ECF No. 1). On November 13, 2018, Devra filed a first amended complaint adding Jubilant as a defendant. (ECF No. 30). Jubilant was eventually dismissed from the suit (ECF No. 69), but Sam's West obtained

1 leave of this court to file a third-party complaint against Jubilant (ECF No. 98). The third-party  
 2 complaint (ECF No. 100) contains the following allegations<sup>1</sup>:

3 Jubilant is a pharmaceutical company that manufactures Lamotrigine, a generic  
 4 prescription drug used to treat epilepsy. (*Id.* at 3). On September 25, 2015, Devra was  
 5 prescribed Lamotrigine. (*Id.*). On October 6, 2015, Sam's Pharmacy #10-4974 at 2650 East  
 6 Craig Road, North Las Vegas, Nevada ("Sam's Pharmacy") "correctly" dispensed one bottle of  
 7 100mg tablets of Lamotrigine to Devra as directed by an electronic prescription transmitted to  
 8 Sam's West by Devra's prescribing physician. (*Id.*). On October 13, 2015, Devra began taking  
 9 the 100mg tablets of Lamotrigine at a rate of one tablet per day, ultimately resulting in injuries  
 10 and damages, including a diagnosis of Toxic Epidermal Necrolysis (the "incident").<sup>2</sup> (*Id.* at 3).

11 On January 13, 2010, Sam's West entered into a written supplier agreement (the  
 12 "agreement") with Jubilant to supply services and/or goods to Sam's West. (*Id.*). The  
 13 agreement included an indemnity clause. (*Id.* at 4). The agreement was amended in January  
 14 2015 and updated on October 19, 2015, potentially indicating the agreement was in force and  
 15 effect at the time of the incident in October 2015. (*Id.* ¶ 13).

16 Sam's West alleges causes of action for contractual indemnity, breach of contract,  
 17 contribution, and declaratory relief. (ECF No. 100). Jubilant now moves to dismiss Sam's  
 18 West's third-party complaint for failure to state a claim upon which relief can be granted (ECF  
 19 No. 108), or, in the alternative, moves for summary judgment (ECF No. 158) as to the third-party  
 20 complaint.

## 21 **II. LEGAL STANDARD**

22 Federal Rule of Civil Procedure 8 requires every complaint to contain a "short and plain  
 23 statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8. Although  
 24 Rule 8 does not require detailed factual allegations, it does require more than "labels and

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25  
 26 <sup>1</sup> At the motion to dismiss stage, the court is required to accept as true all well-pleaded  
 27 allegations. Accordingly, the well-pleaded facts presented here are assumed to be true. Legal  
 conclusions are not entitled to this assumption of truth.

28 <sup>2</sup> Plaintiff alleges in her first amended complaint that the Toxic Epidermal Necrolysis  
 caused "blistering and loss of skin over eighty percent of her body, including tissue covering her  
 eyes, rendering her permanently blind," (*See* ECF No. 30 ¶ 21).

conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). In other words, a complaint must have plausible factual allegations that cover “all the material elements necessary to sustain recovery under *some* viable legal theory.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007) (citation omitted) (emphasis in original); *see also Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

The Supreme Court in *Iqbal* clarified the two-step approach to evaluate a complaint’s legal sufficiency on a Rule 12(b)(6) motion to dismiss. First, the court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in the plaintiff’s favor. *Iqbal*, 556 U.S. at 678–79. Legal conclusions are not entitled to this assumption of truth. *Id.* Second, the court must consider whether the well-pleaded factual allegations state a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the court can draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678. When the allegations have not crossed the line from conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570; *see also Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). The *Starr* court held,

First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subject to the expense of discovery and continued litigation.

*Id.*

If the court grants a Rule 12(b)(6) motion to dismiss, it should grant leave to amend unless the deficiencies cannot be cured by amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Under Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and absent “undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments . . . undue prejudice to the opposing party . . . futility of the amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

1 The court should grant leave to amend “even if no request to amend the pleading was made.”  
 2 *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation marks  
 3 omitted).

### 4 **III. DISCUSSION**

5 The court will first address the motion to dismiss as a threshold matter, and then turn to  
 6 the motion for summary judgment, as necessary.

7 In deciding the motion to dismiss, the court must resolve two larger questions: 1) Was  
 8 there an effective agreement at the time of the incident?; and 2) If so, does the indemnity clause  
 9 apply? If no effective agreement existed, the inquiry ends and the motion to dismiss must be  
 10 granted. If the agreement was valid and enforceable, the applicability of the indemnity clause  
 11 becomes the dispositive question. The court addresses both guiding questions in turn.

#### 12 **A. A valid and enforceable agreement existed at the time of the incident**

13 Jubilant argues that Sam’s West did not plead sufficient facts to establish the existence of  
 14 a valid and enforceable contract at the time of the incident. (ECF No. 108 at 11). Specifically,  
 15 Jubilant contends that Sam’s West’s allegations rely generally on the January 13, 2010,  
 16 agreement and purported renewals, and make no showing that the agreement even exists, or,  
 17 even if it did exist, the allegations do not sufficiently plead that the agreement continued year  
 18 after year in light of its unambiguous expiration clause. (*Id.* at 13). Jubilant concedes that a  
 19 preceding supplier agreement was signed between the parties in 2008, but it argues that that  
 20 agreement expired in 2009, and that there was no written agreement to renew or extend the  
 21 contract. (*Id.* at 12).

22 Sam’s West alleges that it has continued to do business with Jubilant under a 2010  
 23 supplier agreement and in the years following. (ECF No. 100 at 3). Sam’s West supports this  
 24 contention by alleging that the allowances and payment terms of the agreement were updated on  
 25 October 19, 2015. (*Id.*). Sam’s West explained in its opposition to this motion to dismiss that it  
 26 did not attach the agreement to the third-party complaint due to its “confidential, proprietary  
 27 information,” but offered to produce copies for the court for in-camera review. (ECF No. 119,  
 28 n.2).

Jubilant argues that this court already dismissed the validity and enforceability of a supplier agreement between the parties at the time of the incident when it dismissed Sam’s West’s similar cross claims in December 2019. (*See* ECF No. 69). There, the court held that “[t]he agreement’s terms are abundantly clear as to its expiration date...and [i]n the absence of some additional factual matter sufficient to plausibly establish a continuing contractual relationship between the parties...the court is unable to draw a reasonable inference that Jubilant is liable to Sam’s Pharmacy<sup>3</sup> under the supplier agreement.” (*Id.* at 7–8).

The court now holds that Sam’s West has provided sufficient additional factual matter to plausibly establish that a valid and enforceable agreement existed in October 2015. The fact that updates to the agreement—in the form of updating allowances and payment terms—were made on October 19, 2015, presupposes that an agreement existed at the time, and allows the court to draw the reasonable inference that Jubilant and Sam’s West were continuing to do business at the time of the incident.

Jubilant counters that the court should reject this allegation as insufficient since Sam’s West did not allege what the “[t]erms of the [a]greement were, whether the [a]greement was executed, and which parties executed the [a]greement, or the date(s) that the [a]greement had been signed by each party.” (ECF No. 108 at 11). However, Rule 8 does not require plaintiffs to provide “detailed factual allegations,” *Twombly*, 550 U.S. at 555; it merely demands pleading beyond “naked assertions” devoid of factual enhancement. *Iqbal*, 556 U.S. at 678. Drawing all reasonable inferences in favor of Sam’s West, this burden has been met.

**B. The indemnity clause does not apply**

The next question for the court is the applicability of the indemnification clause in the agreement. For reference, the language of the clause as included in the third-party complaint is as follows:

**14. INDEMNIFICATION.** Supplier shall protect, defend, hold harmless and indemnify Company, including its officers, directors, employees and agents, from

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<sup>3</sup> Sam’s Pharmacy is a subsidiary of Sam’s West and is the named party in the first amended complaint. (*See* ECF No. 30). The third-party complaint lists the entity Sam’s West as the third-party plaintiff. (*See* ECF No. 100).

1 and against any and all lawsuits, claims, demands, actions, liabilities, losses,  
 2 damages, costs and expenses (including attorneys' fees and court costs),  
 3 regardless of the cause or alleged cause thereof, and regardless of whether such  
 4 matters are groundless, fraudulent or false, arising out of any actual or alleged:

5 [. . .]

6 (b) Death of or injury to any person, damage to any property, or any other damage  
 7 or loss, by whomsoever suffered, resulting or claimed to result in whole or in part  
 8 from any actual or alleged use of or latent or patent defect in, such Merchandise,  
 9 including but not limited to (i) any actual or alleged failure to provide adequate  
 10 warnings, labelings or instructions, (ii) any actual or alleged improper  
 11 construction or design of said Merchandise, or (iii) any actual or alleged failure of  
 12 said merchandise to comply with specifications or with any express or implied  
 13 warranties of Supplier [. . .]

14 (ECF No. 100 at 2).

15 As a preliminary matter, Sam's West avers that the agreement "clearly contains" a choice  
 16 of law provision which mandates Arkansas law to govern the contract (ECF No. 119 at 2), but  
 17 Sam's West did not include the choice of law provision language in its third-party complaint.  
 18 (*See generally* ECF No. 100). Jubilant argues that Nevada law, not Arkansas law, applies since  
 19 "Sam's West has not established that a valid contract existed at the time" of the incident. (ECF  
 20 No. 122, n.1). However, Jubilant also asserts that "Arkansas law does not differ from Nevada's  
 21 requirement of a clear, unequivocal and express statement regarding indemnification for an  
 22 indemnitee's own negligence." (ECF No. 108 at 8).

23 Nevada law indeed abides by the "express negligence doctrine" when interpreting the  
 24 application of indemnification in negligence claims. *George L. Brown Ins. V. Star Ins. Co.*, 126  
 25 Nev. 317, 324 (2010). More specifically, the Nevada Supreme Court has held that the express  
 26 negligence doctrine requires that a party demanding indemnity from the consequences of its own  
 27 negligence must express that intent in specific terms "within the four corners of the contract."  
 28 *Id.* Arkansas law, however, is less clear, stating that indemnifying an indemnitee for its own  
 negligence is "generally disfavored." *Potlatch Corporation v. Missouri Pacific Railroad Co.*,  
 902 S.W.2d 217, 222 (Ark. 1995).

Because the court finds that a valid contract existed at the time of the incident, and  
 because Sam's West contends that the agreement contained an Arkansas choice of law provision,

1 the court draws the reasonable inference in Sam’s West’s favor to apply Arkansas law at this  
2 motion to dismiss stage.<sup>4</sup>

3 To begin, the Arkansas Supreme Court most recently held that “[a]greements to  
4 indemnify an indemnitee against its own negligence are generally disfavored, closely scrutinized,  
5 strictly construed against the indemnitee and in favor of the indemnitor, and will not be upheld  
6 unless expressed in such clear and unequivocal terms that no other meaning can be ascribed.”  
7 *Potlatch*, 902 S.W.2d at 222. Arkansas courts have also held that while “no particular words are  
8 required,” courts will not impose such indemnification “unless the purpose to do so is spelled out  
9 in unmistakable terms.” *Ark. Kraft Corp. v. Boyed Sanders Constr. Co.*, 764 S.W.2d 452, 453–54  
10 (Ark. 1989) (the court held the following indemnification language—“[s]eller shall indemnify  
11 and hold [b]uyer harmless against any and all liabilities or claims for injuries or damages to any  
12 person or property arising out of such work”—insufficiently clear and unequivocal to require the  
13 seller to indemnify for any actions involving the buyer’s negligence).

14 The *Kraft Corp.* court further held that the language of an indemnity clause “can be  
15 unambiguous and still not spell out in clear, unequivocal, unmistakable terms” the intention of  
16 the parties to obligate the indemnitor to indemnify for the indemnitee’s negligence. *Id.* at 453.  
17 The twist in Arkansas law lies in *Pickens-Bond Construction Co. v. NLR Electric Co.*, 249 Ark.  
18 389 (1970).

19 In *Pickens*, the Arkansas Supreme Court held that broad and sweeping indemnification  
20 language can clearly and unequivocally show the indemnitor’s intention to obligate itself, *even*  
21 *for the negligence of the indemnitee. Id.* In that case, a general contractor (indemnitee) sought to  
22 recover from a subcontractor (indemnitor) all sums paid in settlement of a personal injury case  
23 against the subcontractor. *Id.* The language in the contract at issue stated, in relevant part, that  
24 the subcontractor “shall specifically assume, and does assume, all risks of damage or injury *from*  
25 *whatever cause* to property or persons used or employed on or in connection with his work.” *Id.*  
26 at 391 (emphasis added).

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27  
28 <sup>4</sup> The Ninth Circuit has held that a district court’s choice of law analysis was proper even  
at the motion to dismiss stage. *Cooper v. Tokyo Electric Power Co. Holdings, Inc.*, 960 F.3d  
549, 558 (9th Cir. 2020).

1           The scope of the indemnification language in *Pickens* (“from whatever cause”) is akin to  
 2           the language found in the relevant agreement here (i.e., “regardless of the cause or alleged cause  
 3           thereof...”). The critical caveat is that while *Pickens* held that it was *possible* for a broad,  
 4           sweeping indemnification clause to be clear and unequivocal on the matter of indemnifying  
 5           negligence, the court expressly did *not* extend its holding to instances where the indemnitee is  
 6           *solely* negligent. *Id.* at 402.

7           The *Pickens* court clarified that while it found the broad indemnification clause to apply  
 8           when the indemnitee was guilty of contributory negligence, indemnification would not apply if  
 9           the indemnitee’s negligence was the “sole proximate cause.” *Id.*

10          Turning more specifically to the language at issue here, the indemnification clause in the  
 11          parties’ agreement is extraordinarily broad. In it, Jubilant indemnifies Sam’s West “...from and  
 12          against any and all lawsuits, claims, demands, actions, liabilities, losses, damages, costs and  
 13          expenses (including attorneys’ fees and court costs), **regardless of the cause or alleged cause**  
 14          **thereof, and regardless of whether such matters are groundless, fraudulent or false...**”  
 15          (*Supra* at 5; ECF No. 100 at 4) (emphasis added).

16          At the motion to dismiss stage, this language is broad and sweeping enough to encompass  
 17          Jubilant’s intention to even indemnify an alleged incident resulting from Sam’s West’s  
 18          contributory negligence under Arkansas law. The crucial distinction here, however, is that this  
 19          court already held that since Jubilant’s liability was federally preempted (*See* ECF No. 69 at 6–  
 20          7), the only question before the court in the overarching suit is whether Sam’s West was *solely*  
 21          negligent in how it filled Devra’s prescription. And this court’s reading of Arkansas law does  
 22          not compel an interpretation that a broad indemnification clause should be applied to this type of  
 23          sole negligence by an indemnitee.

24          Sam’s West fiercely argues that Arkansas law “unequivocally” applies to Sam’s West’s  
 25          claims for contractual indemnity pursuant to the agreement and that it is “undisputed that  
 26          Jubilant expressly agreed to defend and indemnify Sam’s West for incidents such as the incident  
 27          alleged in the first amended complaint.” (ECF No. 119 at 5–6). Sam’s West further contends  
 28          that the determination of its own negligence, even if proven at trial, “has no legal bearing” on

1 Sam's entitlement to indemnification by the language in the agreement. (*Id.*). The court  
 2 disagrees. As explained above, the fact that Jubilant's negligence is no longer at issue before the  
 3 court is determinative of the applicability of the indemnification clause under Arkansas law.

4 Furthermore, because the court holds, as a matter of law, that Sam's West does not have a  
 5 plausible claim for relief under the indemnification clause contained within the agreement—even  
 6 when granting all reasonable inferences in Sam's West's favor—the court finds that amendment  
 7 would be futile.

8 Accordingly, the court GRANTS Jubilant's motion to dismiss (ECF No. 108) Sam's  
 9 West's third-party complaint (ECF No. 100) as to the first claim of contractual indemnity, with  
 10 prejudice.

### 11 **C. Remaining Claims**

#### 12 *1. Breach of Contract*

13 Sam's West's breach of contract claim alleges Jubilant materially breached by not  
 14 naming Sam's West as an additional named insured on Jubilant's certificates of insurance for  
 15 purposes of paying any costs associated with indemnification. Since this claim is contingent  
 16 upon the applicability of the indemnity clause, and since the court holds that the indemnity  
 17 clause is inapplicable as a matter of law, the court GRANTS Jubilant's motion to dismiss (ECF  
 18 No. 108) Sam's West's third-party complaint (ECF No. 100) as to the second claim of breach of  
 19 contract, with prejudice.

#### 20 *2. Contribution*

21 Pertaining to Sam's West's third claim of contribution, Jubilant avers, and Sam's West  
 22 concedes, that this court's December 27, 2019, order (ECF No. 69)—ruling that causes of action  
 23 against Jubilant for negligence, comparative negligence, and equitable indemnity were  
 24 preempted by federal law—summarily disposes of this claim.

25 Accordingly, the court GRANTS Jubilant's motion to dismiss (ECF No. 108) Sam's  
 26 West's third-party complaint (ECF No. 100) as to the third claim of contribution. The court  
 27 dismisses this claim without prejudice consistent with its previous order. (*See* ECF No. 69).

28 . . .

1                   3. *Declaratory Relief*

2                   Sam's West's final cause of action is declaratory relief, but declaratory relief is a remedy,  
3 not an independent cause of action. 28 U.S.C. § 2201; *see Stock West, Inc. v. Confederate*  
4 *Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). Because Sam's West  
5 asserts other independent causes of action, the court will liberally interpret the action as a request  
6 for a remedy.

7                   Sam's West's initial claim for declaratory relief avers that it "is premised on the present  
8 controversy between the parties regarding the applicability and enforceability of the [s]upplier  
9 [a]greement and contractual indemnity obligations pursuant thereto." (ECF No. 119 at 14). As  
10 explained in Part III, *supra*, while the court finds the agreement valid and enforceable for  
11 purposes of this motion, it rejects enforceability of the indemnity obligations of the agreement  
12 under these facts. Thus, Sam's West's claim for declaratory relief on the matter of  
13 indemnification fails.

14                  Sam's West also more generally seeks declaratory relief in judicial determination of its  
15 respective rights and Jubilant's duties and obligations pursuant to the agreement "as they pertain  
16 to [p]laintiff's lawsuit." (*Id.*). In analyzing a request for declaratory relief, courts determine  
17 "whether the facts alleged, under all of the circumstances, show that there is a substantial  
18 controversy, between parties having adverse legal interests, of sufficient immediacy and reality  
19 to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549  
20 U.S. 118, 127 (2007). Courts cannot grant declaratory relief based on hypothetical facts or  
21 speculative issues. *See id.* at 126–35. Rather, the dispute must be "definite and concrete." *Id.* at  
22 127.

23                  The court finds that declaratory relief is improper here since the action is contingent on  
24 successful litigation of a pending tort suit—an outcome insufficiently definite or concrete to  
25 present a legally protectable interest creating a justiciable controversy ripe for declaratory relief.  
26 *Id.*; *see also Knittle v. Progressive Cas. Ins. Co.*, 112 Nev. 8, 11 (1996). Prematurely granting such  
27 declaratory relief places the court in the impossible position of attempting to guess what facts  
28 might be determined at trial and then to apply those hypothetical facts to the agreement.

1 Accordingly, Sam's West's request for declaratory relief is DENIED.

2 **IV. CONCLUSION**

3 Accordingly,

4 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Jubilant's motion to  
5 dismiss (ECF No. 108) Sam's West's third-party complaint (ECF No. 100) be, and the same  
6 hereby is, GRANTED. The first and second claims against Jubilant are DISMISSED with  
7 prejudice. The third claim against Jubilant is DISMISSED without prejudice. Further, Sam's  
8 West's request for declaratory relief is DENIED.

9 IT IS FURTHER ORDERED that given the court's disposition of this matter at the  
10 motion to dismiss stage, Jubilant's motion for summary judgment (ECF No. 135) as to the third-  
11 party complaint, be, and the same hereby is, DENIED, as moot.

12 The clerk is hereby instructed to dismiss Jubilant as a third-party defendant in this suit.

13 DATED January 14, 2022.

14   
15 UNITED STATES DISTRICT JUDGE